IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.83 OF 2002

Rakesh Harilal Kahar,
Aged about 25 years, permanently
residing at Behind Shaneshwar Mandir,
H.S.Khan Chawl, Khan Compound,
Ravalpada, S.N.Dubey Road,
Dahisar (E), Mumbai - 68
(and at present undergoing sentence
imposed upon him at Yerawada Central ...Appellant
Prison, Yerawada, Pune.) (Ori.Accused)

Versus

The State of Maharashtra
(at the instance of Sr.P.I.,
Dahisar Police Station vide
their C.R.No.255/98) ...Respondent

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Ms.Pooja P.Bhojane with Mr.Nitin Sejpal for Appellant.

Mr.Y.S.Shinde, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 5, 2006.

ORAL JUDGMENT :

1. This Appeal takes exception to the Judgment and Order passed by the Additional

Sessions Judge for Greater Mumbai dated November 30, 2001 in Sessions Case No.250 of 1999. The Appellant was charge-sheeted and tried for offence punishable under Section 392 read with Section 114 and Section 392 read with Section 397 of the Indian Penal Code (hereinafter referred to as the 'IPC') on the allegation that he along with accused Nilesh Chandrakant Kadam (since deceased), on 30th May 1998 between 12.40 to 12.50 hours at the Office of Mahavir Stone Supply Company, Hanuman Tekdi, Shiv Vallabh Road, Dahisar (East), Mumbai - 68, committed robbery of an amount of Rs.49,200/- (Rupees Forty-nine Thousand Two Hundred), which was the property of the Mahavir Stone Supply Company and then in possession of the complainant Umeshchandra Ajmera (PW 1), and that the accused aided each other in the commission of the said offence.

2. The Trial Court, on analysis of the evidence on record adduced by the prosecution, by the impugned Judgment and Order, recorded finding of guilt against the Appellant for offence punishable under Section 392 read with Section 414

and under Section 392 read with Section 397 of the IPC and sentenced him to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/- (Rupees One Thousand), in default of payment of fine, to suffer rigorous imprisonment for a further period of one month.

3. It is not in dispute that the Appellant has already undergone the sentence provided under the impugned decision. However, this Appeal is pursued by the Appellant, as the order of conviction recorded against him would operate as stigma. Only for that reason, the hearing of the matter proceeded on merits.

4. To establish the offence against the Appellant, prosecution examined complainant Narendra U.Ajmera (PW 1) and another eye-witness Umesh T.Sonar (PW 2). They have deposed about the role of the Appellant in the commission of the alleged offence. The prosecution has then examined the Special Executive Officer-Waman D.Sapre (PW 4), who conducted the test identification parade on 18th December 1998, in which the Appellant was

identified by complainant (PW 1). Here, it is relevant to note that the Appellant was arrested in connection with the alleged offence on 8th December 1998 and the test identification parade was held on 18th December 1998. The prosecution has also examined panch witness-Ramesh P.Pipada (PW 3) to prove the recovery of sickle, weapon used in the commission of the offence at the instance of the Appellant. In addition, prosecution has examined Investigating Officer Vilas G.Pandit (PW 5). Several contentions have been raised before this Court. Amongst others, that the so-called document First Information Report cannot be the basis to proceed against the Appellant. In fact, the Investigating Officer (PW 5) had recorded the statement of the complainant on the scene of offence itself and that statement ought to have been treated as oral information given, and as the same was reduced into writing on the scene of offence by the concerned Police Officer, it ought to have been treated as First Information Report. It is also argued that the recovery of weapon (sickle) is also vitiated. From the evidence of panch witness Ramesh P.Pipadia (PW 3), it would

appear that the sickle was recovered by the Police from a place which was accessible one. Even though, all these questions have been raised at the hearing of this Appeal, in my opinion, the Appeal ought to succeed on the argument that the test identification parade in which Narendra U.Ajmera (PW 1) is stated to have identified the Appellant, as having participated in commission of the offence, is vitiated. This is so because, the Special Executive Officer (PW 4) who conducted the test identification parade, did not ask the witness (PW 1) before the parade commenced as to whether he had opportunity to see the accused or had seen the photograph of the accused beforehand. It has also come in the evidence of Waman D.Sapre (PW 4) that he did not inform the accused that it was open to him to change his clothes before identification parade is conducted. According to the Appellant, Waman D.Sapre (PW 4) has admitted in his evidence in Paragraph 4 in the following terms:

> "I did not ask the identifying witness as to whether he was shown the suspect or his photographs prior to the parade. I did not obtain the signatures of the panchas

on every page of Exhibit-16."

5. Only today, I have had occasion to decide this issue in Criminal Appeal No.115 of 2001 dated 4th and 5th September 2006. I have accepted the argument canvassed in that Appeal that it was obligatory for the Special Executive Officer to ask the witness as to whether he had opportunity to see the suspect or his photograph prior to the parade. That is the requirement stipulated in the High Court Criminal Manual and it is mandatory to be observed. On this reasoning, the test identification parade conducted in the present case will have to be discarded.

6. There is additional reason for which the Appellant should succeed in the contention that test identification parade be discarded. In Paragraph 5 of the cross-examination, Waman D.Sapre (PW 4) has admitted that he did not ask the suspect as to whether he wanted to change his clothes. As per the requirement specified in the High Court Criminal Manual, it is necessary for the Special Executive Officer to inform the suspect that it is

open to him to change his clothes before being paraded, if he so desired. That is the mandatory requirement. Even this requirement has not been observed by the Special Executive Officer (PW 4).

7. Accordingly, I have no hesitation in taking the view that the test identification parade conducted by the Special Executive Officer (PW 4) is of no avail to the prosecution. The same will have to be discarded on the above reasoning. The Assistant Public Prosecutor fairly accepts that the Trial Court has not even adverted to these two crucial admissions in the evidence of Waman D.Sapre (PW 4) while analysing his evidence. Viewed thus, the opinion recorded by the Trial Court on the issue of efficacy of test identification parade in the present case, cannot be sustained in fact or in law.

8. Once the test identification parade was to be discarded, in that case, there will be no legal evidence to establish the complicity of the involvement of the Appellant in the commission of the crime. Indeed, the prosecution has relied on

the evidence of Narendra U.Ajmera (PW 1) but as the identification parade conducted in which PW 1 has identified the Appellant is to be discarded, the version of PW 1 cannot be the basis to proceed against the Appellant. In such a case, the accused will have to be given benefit of doubt. The prosecution has also relied on evidence of Umesh T. Sonar (PW 2) but he has not participated in the test identification parade conducted by Special Executive Officer (PW 4). The Investigating Officer has not given any reason whatsoever as to what prevented the PW 2 to attend the said test identification parade. Indeed, PW 2 has identified the Appellant in Court for the first time. That identification will have no value and cannot be the sole basis to proceed against the Appellant.

9. Accordingly, it will have to be held that the prosecution has failed to prove the involvement of Appellant beyond reasonable doubt. The Appellant, however, deserves benefit of doubt. It is not necessary to burden this Judgment with other issues.

10. The Appeal therefore succeeds. It is unfortunate that the Appellant has undergone complete period of sentence imposed by the Trial Court in the meantime. However, this Court can only express word of regret for that situation. The Appeal accordingly, is allowed. Impugned Judgment and Order is set-aside. The Appellant is acquitted of the charge of having committed the

alleged offence, for which he was convicted by the Trial Court, by giving benefit of doubt.

11. Muddemal be disposed of in accordance with law.

A.M.KHANWILKAR, J.